Supreme Court, U.S.
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No. 92-1377

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT IAN SHERMAN, for himself and as natural guardian for RICHARD HARRY SHERMAN, a minor son,

Petitioners,

v.

COMMUNITY CONSOLIDATED SCHOOL DISTRICT 21 OF WHEELING TOWNSHIP, LLOYD DESCARPENTRIE, School District Superintendent, and DR. FERNE GARRETT, Principal of Riley School, individually and as representatives of the State of Illinois, and ROLAND W. BURRIS, Attorney General of the State of Illinois,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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LIST OF ALL PARTIES

ROBERT IAN SHERMAN,
(for himself and as natural
guardian of Richard Harry Sherman)
RICHARD HARRY SHERMAN,
a Minor,

Petitioners and Plaintiffs below

COMMUNITY CONSOLIDATED SCHOOL DISTRICT 21
OF WHEELING TOWNSHIP,
LLOYD DESCARPENTRIE
(SCHOOL DISTRICT SUPERINTENDENT),
DR. FERNE GARRETT
(PRINCIPAL OF RILEY SCHOOL),
ROLAND BURRIS,
(ATTORNEY GENERAL
FOR THE STATE OF ILLINOIS)

Respondents and Defendants below

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RESPONDENTS' BRIEF IN OPPOSITION

STATUTORY PROVISIONS

Patriotism and principles of representative government—Proper use of the flag—Method of voting—Pledge of Allegiance.

Section 27-3. Patriotism and principles of representative government—Proper use of flag—Method of voting—Pledge of Allegiance. American patriotism and the principles of representative government, as enunciated in the American Declaration of Independence, the Constitution of the United States of America and the Constitution of the State of Illinois, and the proper and display of the American flag, shall be taught in all public schools (Emphasis added) and other educational institutions supported or maintained in whole or in part by public funds. No student shall receive a certificate of graduation without passing the satisfactory examination upon such subjects.

Instructions shall be given in all such schools and institutions in the method of voting at elections by means of the Australian Ballot System and the method of the counting of votes for candidates.

The Pledge of Allegiance shall be recited each school day by peoples in elementary educational institutions supported or maintained in whole or in part by public funds. 105 ILCS 5/27-3 (Formerly Ill.Rev.Stat. Ch. 122, Par. 27-3).

STATEMENT OF THE CASE

On October 28, 1988, plaintiff Robert Ian Sherman, for himself and as natural guardian for Richard Harry Sherman and the Society of Separationists, Inc.[1] filed a pro se complaint, in the United States District Court in Northern District of Illinois, against the Community Consolidated School District 21 of Wheeling Township, Lloyd Des Carpentries, School District Superintendent and Dr. Ferne Garrett, Principal of Riley School (School Defendants) alleging violations of the First and Fourteenth Amendments. Plaintiffs contend that the last paragraph of the Illinois Pledge Law, 105 ILCS 5/27-3 (formerly Ill. Rev. Stat. Ch. 122, Par. 27-3) was unconstitutional in that it required plaintiff, Richard Harry Sherman, an Atheist, to recite the pledge of allegiance including the phrase "under God" (R. 1). Later the attorney general of the State of Illinois was added as a defendant. (R. 64 Re-Amended Complaint Par. 7.)

In the District Court, all defendants filed a Motion to Dismiss which was denied. *Sherman v. Community Consol. Dist. 21*, 714 F.Supp. 932 (N.D Ill.1989). Plaintiffs were allowed to amend their Complaint two times. Defendants filed another Motion to Dismiss which was similarly denied. *Sherman v. Community Consol. Dist. 21*, 745 F.Supp. 1371 (1990). Defendants made Motions for Summary Judgment which were granted. *Sherman v. Community Consol. Dist. 21*, 758 F.Supp. 1244 (1991). The District Court found

[1] The Society of Separationists was dismissed from this suit for lack of standing by order dated August 17, 1990. *Sherman*, Supp. 1371 (1990).

that there was no genuine issues of material fact as to whether the Illinois Pledge Law passes all three prongs of the *Lemon* test.

The Court held that the Illinois Pledge Law satisfied the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1991). It has a secular purpose, does not advance religion and does not entangle the government in religion. Forced readings of the Pledge would pose difficulties under the Free Speech and Free Exercise clauses, but the Court concluded that the Statute is not coercive as written or applied. Although the pledge law states that the pledge "shall be recited each school day by pupils", it does not say by all pupils, in the absence of any penalty implies that the pupils are entitled to keep silent. *Sherman v. Community Consol. Dist. 21*, 758 F.Supp. 1244 (1991).

Plaintiff's appeal to the United States Court of Appeals for the Seventh Circuit. The Court of Appeals affirmed the District Court's granting of Summary Judgment, finding that neither the Illinois Pledge Law nor the practice of the School District violated the Free Exercise or Establishment Clauses. The Pledge Law states that the Pledge "shall be recited each school day by pupils" in public schools. The court acknowledged that "when resolving statutory ambiguities, the Supreme Court of Illinois adopts readings that save rather than destroy state laws, e.g., *Country Mutual Insurance Company v. Knight*, 40 Ill.2d 423, 240 N.E.2d 612 (1968). The Court reasoned that it makes far more sense to interpretate this Statute to mean "by willing pupils" rather than "by all pupils." *Sherman v. Community Consol. Dist. 21*, 980 F.2d at 442. The Court went on to state that school administrators and teachers satisfied the "shall" requirement by leading the pledge and ensuring that at least some pupils recite it. Leading the pledge is not optional but participation is. *Sherman v.*

Community Consol. Dist. 21, 980 F.2d at 442. Ultimately, the Court relied upon the school authorities' inherent power to prescribe the curriculum and found no Free Exercise Clause violation.

In finding No Establishment Clause violation, the Court was not disposed to resolve this case by parsing *Lemon*. The Court reasoned,

> Of course "*Lemon*" was not devised to identify prayers smuggled into civic exercises, and its status as a general purpose tool for administering the establishment clause is in doubt . . . The Court heard *Lee v. Weisman*, in large part to reconsider *Lemon* and *Lee* concluded without renewing *Lemon*'s lease. The majority reserved decision on the future of *Lemon*. ____ U.S. ____, 112 S.Ct. at 2655. Three members of the majority signed an opinion employing *Lemon*, ____ U.S. ____, 112 S.Ct. at 2663-64 (Blackmun, J., joined by Stevens & O'Connor, J.J.), but one member of this group has expressed doubts. *Aguilar v. Felton*, 473 U.S. 402, 426-30, 105 S.Ct. 3232, 3245-47, 87 L.Ed.2d 290 (1985) (O'Connor, J., dissenting). The author of the majority opinion in *Lee* has disparaged *Lemon*, see *Allegheny*, 492 U.S. at 655-56, 109 S.Ct. at 3134 (opinion of Kennedy, J.). The fifth member of the majority in *Lee* wrote a concurring opinion that did not rely on or endorse *Lemon*. ____ U.S. at ____, 112 S.Ct. at 2667-78 (Stouter, J.). And four Justices proposed to jettison *Lemon* forthwith. ____ U.S. at ____, 112 S.Ct. at 2685 (Scalia, J., dissenting, joined by Rehnquist, C. J., and White & Thomas, J.J.). *Sherman v. Community Consol. Dist. 21*, 980 F.2d at 445.

Instead the District Court took a more direct approach. The Court examined what it regarded as the original intent of the founders of the United States regarding references to a deity and concluded that our founding fathers did not consider such references a violation of the Estab-

lishment Clause. "Unless we are to treat the founders of the United States as unable to understand their handy work (or, worse, hypocrites about it) we must ask whether those present at the creation deemed ceremonial invocations of God as 'Establishment.' They did not." *Sherman*, 980 F.2d at 445.

Finally, the Court of Appeals ruled that the 11th Amendment protected the Attorney General of Illinois from suit in this case. The court affirmed the District Court's judgment in all other respects.

SUMMARY OF ARGUMENT

The Seventh Circuit's decision is consistent with *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and *Lee v. Weisman*, 112 S.Ct. 2649, 120 L. Ed. 2d 467 (1992). The court did not adopt the doctrine of "Ceremonial Deism" in place of the *Lemon* test. Where the court is faced with a state sponsored and state directed religious exercise *Lemon* may be the appropriate test. However, where the court is faced with a school sponsored exercise which is clearly a patriotic exercise, the more appropriate analysis is under the doctrine of "Ceremonial Deism".

The Seventh Circuit considered the special interest of school age children. The purpose of the Illinois pledge law is to teach school age children American patriotism and principles of representative government. The state legislature is entitled to establish a curriculum for its schools which includes teaching the Pledge of Allegiance and conforms with the role and purpose of the American Public School system which includes teaching those fundamen-

tal values necessary to maintain a democratic political system.

Illinois and federal laws require statutes to be interpreted in a Constitutional manner that they can be interpreted in a Constitutional and Unconstitutional manner. The Seventh Circuit was correct in finding that the word "shall" does not mean "all" students are required to state the Pledge of Allegiance. Since Richard Sherman was never forced to recite the Pledge of Allegiance nor threatened with punishment nor punished for failure to participate in the recitation of the Pledge of Allegiance, his rights under the Free Exercise clause of the First Amendment were not violated.

ARGUMENT

REASONS FOR DENYING THE WRIT

THE SEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH *LEMON v. KURTZMAN*, 403 U.S. 602 (1971) AND *LEE v. WEISMAN*, 112 S. CT. 2649, 120 L.Ed.2d 467 (1992).

In *Lee* the majority opinion reserved decision on the future of *Lemon*. The court found "[t]he government involvement with religious activity [the inclusion of invocations and benedictions in the form of prayer at a graduation ceremony] in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school. Conducting this form of religious observance conflicts with settled rules pertaining to prayer exercises for students, and that suffices to determine the question before us". *Lee v. Weisman* 112 S. Ct. at 2655.

Petitioners in support of their position rely upon *Abington School District v. Schempp*, 374 U.S. 303 (1963), (bible reading in public schools) *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (display of a creche and chanukah menorah), *Edwards v. Aguillard*, 482 U.S. 578 (1987) (teaching of creationism in public school), *Grand Rapids School District v. Bell*, 437 U.S. 373 (1985) (bible reading in public schools) and *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (invocations and benedictions in the form of prayer at a graduation ceremony) which clearly are persuasive to the point of creating a state-sponsored and state-directed religious exercise in public schools. Under such circumstances the three-part *Lemon* test may be the appropriate test. However, where the court is faced with a school-sponsored exercise which is clearly a patriotic exercise, the more appropriate analysis is under the doctrine of "Ceremonial Deism". Clearly, the pledge statute's intent is to inspire devotion to love of country, to instill in young minds a healthy respect for history, traditions and values of our democratic form of government and to prepare our students for citizenship. The Seventh Circuit was not bound to apply *Lemon v. Kurtzman*, 403 U.S. 602 (1971) because the issue squarely before the court was one of patriotism not religion. *Lynch v. Donnelly* 465 U.S. 668, 676, 104 S. Ct. 1355, 1361, included the Pledge of Allegiance and a list of civic exercises with religious connotations, which the court found permissible. The court implicitly approved the Pledge of Allegiance in other cases. See *Engel v. Vitale*, 370 U.S. 421 at 345 N. 21. In *School District of Abington Township*, 374 U.S. 303, 83 S. Ct. 1560 (1963) (Brennan, J. concurring), Justice Brennan stated;

> "A reference to divinity in the revised Pledge of Allegiance . . . . may merely recognize the historical fact that our nation was believed to have been founded 'under God' thus reciting the Pledge may be no more

> of a religious exercise than the reading allowed of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact."

"For that reason because of their history and ubiquity, [these] practices are not understood as conveying approval of particular religious beliefs." *Sherman v. Community Consol. Dist. 21*, 980 F.2d 437, 447 (7th Cir. 1992).

THE SEVENTH CIRCUIT DID NOT ADOPT THE DOCTRINE OF "CEREMONIAL DEISM" IN PLACE OF THE *LEMON* TEST.

It cannot be ignored that the District Court found that the Illinois Pledge law satisfied all three prongs of the *Lemon* test "it has a secular purpose, does not advance religion and does not entangle the government in religion". *Sherman v. Community Consol. Dist. 21*, 980 F.2d 437, 440. This finding is not inconsistent with nor is it disputed by the Seventh Circuit Court of Appeals.

THE SEVENTH CIRCUIT CONSIDERED THE SPECIAL INTERESTS OF SCHOOL-AGED CHILDREN WHEN RENDERING ITS DECISION.

Petitioners attempt to circumvent the real issues in this case. They claim that the Seventh Circuit gave absolutely no consideration to the special elementary school context of this case. This simply is not true. When one analyzes the purpose behind the Illinois Pledge Law and applies that purpose to school-aged children it becomes clear that the Illinois Legislature had the school childrens' welfare in mind when enacting the Pledge Law. The focus of the Illinois Pledge Law is on teaching "American patriotism and principals of representative government as enunciated in the American Declaration of Independence, the Consti-

tution of the United States of America, and the Constitution of the State of Illinois." 105 ILCS 5/27-3 (formerly Ill. Rev. Stat., Ch. 122, Par. 27-3) In *Bethel v. Fraser*, 478 U.S. 675, 106 S. Ct. 159 (1986), the Court recognized that the role and purpose of the American Public School System includes the "inclusion of fundamental values necessary to the maintenance of the democratic political system". *Bethel*, 478 U.S. at 681. The Illinois Pledge Law embodies the secular educational goals recognized by the Supreme Court in *Bethel* and is consistent with the principles of the First Amendment. The purpose of this legislation was to teach children to respect their country and to express the legislature's concern for "patriotism in our country". Ill. Legislative Service, P.A. 81-959, 1979. Senator Nimrod and Representative Pullen stated several times that the purpose of the law was to instill patriotic concern and knowledge of American ideals in elementary school students. See e.g. Ill. Gen. Assembly, Senate Floor Debates, May 22, 1979, pp. 273-275; June 28, 1979, p. 92, House Floor Debates, June 25, 1979, p. 65.

A full reading of the Illinois Pledge Statute shows that it has a patriotic or educational purpose rather than a religious purpose. Our Supreme Court, "is reluctant to attribute unconstitutional motives to this state, particularly when a plausible, secular purpose for the State's program may be discerned from the face of the statute." (Citations omitted.) *Board of Education of Westside Community Schools v. Mergens* 110 S.Ct. 2356, 2371 (1990).

A state legislature is entitled to establish a curriculum for its schools which includes teaching the Pledge of Allegiance. In *Palmar v. Board of Education of the City of Chicago*, 603 F.2d 1271, 1274 (7th Cir. 1979), cert. denied, 444 U.S. 10226 (1980), the Seventh Circuit held that a public school teacher who was opposed to the Pledge and

other patriotic exercises on religious grounds could not "require others to submit to her views and forego a portion of their education they would otherwise be entitled to enjoy." The right of the School Board to decide what the pupils are taught implies to the corresponding right to require teachers to act accordingly.

THE SEVENTH CIRCUIT COURT OF APPEALS DID NOT REWRITE THE PLEDGE STATUTE

Petitioners contend that the word "shall" in the Illinois Pledge Statute is unambiguous and requires compulsory recitation of the Pledge of Allegiance. Petitioners argument on Statutory Construction is not as limited as they would have this Court believe. Illinois and Federal laws require statutes to be interpreted in a constitutional manner if they can be interpreted in a constitutional and unconstitutional manners. *Country Mutual Insurance v. Knight*, 40 Ill.2d 423, 240 N.E.2d, 612, 614 (1968); *St. Martin Evangelical Lutheran v. South Dakota*, 451 U.S. 772, 780, 101 S.Ct. 2142, 2147 (1981).

In *Andrews v. Foxworthy*, 71 Ill.2d, 13, 373 N.E.2d 1332 (1978), the Illinois Supreme Court stated:

> "the use of the words 'shall' or 'must' is generally regarded as mandatory. However, the term 'shall' does not have a fixed or inflexible meaning. It can, in fact, be construed as meaning 'may' depending on the legislative intent" *Andrews*, 373 N.E. 2d at 1335.

Thus, *Andrews* demonstrates that the Illinois Pledge Law is not mandatory as petitioners argue.

The Court in *Brockett v. Spokane Arcadas, Inc.*, 472 U.S. 491, 105 S.Ct. 2794 stated;

> "[n]ormally, however, we defer to the construction of a state statute given it by the lower federal courts

> . . . We do so not only to render unnecessary review of their decisions in this respect, but also to reflect our belief that District Courts and Courts of Appeals are better schooled in and more able to interpret the law of their respective states." (Citations omitted) *Brockett*, 472 U.S. at 499-500.

Petitioners must also be able to show that the statute is unconstitutional as applied, not merely that it may be interpreted as unconstitutional. *Van Zandt v. Thompson*, 839 F.2d 1215, 1218 (7th Cir. 1988). The petitioners are unable to show that the Illinois Pledge Law has been applied in an unconstitutional manner. The uncontroverted Affidavits of the School Defendants state that it is the policy and practice of the school district not to require any student to stand during, recite or otherwise participate in the Pledge of Allegiance, nor is it the policy and practice to punish or threaten to punish students because of their refusal to participate in the Pledge of Allegiance. (R. 62) Likewise, the minor plaintiff has never been forced to recite the Pledge of Allegiance or threaten with punishment nor punished for failure to participate in the recitation of the Pledge. Clearly, Richard Sherman's rights under the Free Exercise clause of the First Amendment were not violated.

CONCLUSION

The opinion of the United States Court of Appeals for the Seventh Circuit, should be allowed to stand because the same is in conformity with the applicable facts and law and this Court should deny the Petitioners' petition for the reasons stated herein.

Respectfully submitted,

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